

Office of the Presiding Officer
Military Commission

20 September 2005

SUBJECT: Presiding Officers Memorandum (POM) # 4-3: Motions Practice

This POM supersedes POM # 4-2 issued 7 Oct 2004

1. Purpose. This POM establishes the procedures for motions practice before Military Commissions. If a party wishes the Presiding Officer to take action on a matter, it must be presented to the Presiding Officer in accordance with this Memorandum.

2. This POM does not apply to:

a. Service upon anyone other than the Presiding Officer or opposing counsel. As this POM applies only to service of a filing to the Presiding Officer and opposing counsel as to matters to be resolved by the Presiding Officer, it does not constitute service upon the Appointing Authority, the Department of Defense, the Office of General Counsel, the Office of Military Commissions, or any other person or entity other than the Presiding Officer and opposing counsel. With respect to service upon opposing counsel, service is effective only with respect to matters to be resolved by the Commission and the Presiding Officer, and does not constitute service for any other purpose such as to present matters to the Appointing Authority or others for resolution or attention.

b. Formatting filings with respect to witness requests. *See* POM # 10-1.

c. Formatting filings with respect to Access to Evidence, Discovery, and Notice Provisions. *See* POM # 7-1.

d. Formatting filings with respect to Requesting Conclusive Notice to be Taken. *See* POM # 6-2.

e. Wherever another POM specifically provides that this POM, or portions thereof, do not apply.

f. Requests to the entire Commission on the admissibility of evidence as provided in paragraph 6D(1), MCO # 1.

g. Briefs directed by the Presiding Officer. In the Order directing the brief, the Presiding Officer will specify which, if any, provisions of this POM apply.

h. Formatting filings with respect to Requests for Protective Orders or Limited Disclosure. *See* POM # 9-1.

3. Definitions.

a. A "motion," as used in this POM, is the original request from the moving party (the party requesting relief) to the Presiding Officer for any type of relief, or for the Presiding Officer to direct another to perform, or not perform, a specific act.

b. A "filing" includes a written motion, response, reply, supplement, notice of a motion, request for special relief, or other communication involved in resolving a motion.

c. A "response" is the opposing party's answer to a motion.

d. A "reply" is the moving party's answer to a response.

e. A "supplement" is a filing in regard to a motion other than a motion, response, or reply.

f. A filing is "sent" or "filed" when sent via email to the correct email address of the recipient(s). If there is a legitimate question whether the email system functioned correctly (bounced email notification for example), the sender shall again send the filing until satisfied it was transmitted or an email receipt is received. *See* POM # 12 and paragraph 3g(2) below concerning whether a filing is before the Presiding Officer for decision.

g. Receiving filings.

(1) A filing is "received" by the opposing party when it is sent to the proper parties per paragraph 5 below - with the following exceptions:

(a) The recipient was OCONUS when the email was sent in which case the filing is received on the first duty day following return from OCONUS.

(b) The filing was sent on a Friday, Saturday, or Sunday when the recipient was not OCONUS, in which case the filing is received the following Monday. If the following Monday is a Federal holiday, the filing is received on the following Tuesday.

(c) Upon request by the receiving party or the Chief Prosecutor or Defense Counsel or their Chief Deputies on behalf of their counsel, the Presiding Officer establishes a different "received date" to account for unusual circumstances. Requests to extend the time a filing was received shall be in the form of a special request for relief. In the alternative, a request for an extension may be filed. *See* paragraph 13b.

(2) A filing is not received, in terms of being before the Presiding Officer for resolution, unless it has been placed in the filings inventory as an active filing. *See* POM # 12.

4. Managing motions practice. The Assistant to the Presiding Officer may not resolve motions or grant extensions, but the Assistant is authorized to manage the processing of motions and other filings and to direct compliance with this POM to include both matters of form and content, without referral of the matter to the Presiding Officer. Only the Presiding Officer may grant a delay or departure from the time required for a filing; however, the Presiding Officer's decision on such matters may be announced to the parties by the Assistant.

5. Sending, serving, and formatting filings. Enclosures 1-3 provide samples of a motion, response, and reply. In addition, as to every filing, unless this POM or another POM specifically provides otherwise:

a. The filing will be sent by email as an attachment, and will be in Microsoft Word or PDF. If a recipient does not have these programs, text attachments will be saved and sent as RTF (rich text format) that can be opened by almost any word processing program. Attachments will not be in “track changes” or “mark-up” format. The pages will be numbered, and the footer will also indicate the number of pages.

b. All emails to the Presiding Officer and the Assistant will be on a single topic. *See* POM # 3-1. In motions practice, a single email will not address or contain more than one filing.

c. The filing will carry the caption of the case on the top left of the first page, and the subject of filing on the right top. (*See* the samples at the enclosures.) The subject shall be usefully descriptive containing the name of the party (prosecution/defense) filing it, the type of filing (motion, response etc.) and a unique and descriptive name of the filing. Generic or non-descriptive subject lines (such as Motion to Dismiss, or Motion for Appropriate Relief) are not helpful and will not be used. Documents received with non-descriptive or unhelpful subject lines will be returned by the Presiding Officer or the Assistant for compliance with this POM. If a filings inventory number has been assigned, it will be on the first line of the subject. Example: A response to P2 in *US v Jones* should read: “*P2 Jones - Defense Response - Motion to Exclude Statements of Mr. Smith.*”

d. The subject line of the email to which the filing is attached will follow the same guidance as paragraph 5c above to assist the parties in managing email files. If a filings inventory number has been assigned, it will be at the beginning of the subject line.

e. The names given to matters that may appear in the filings inventory may not be classified or otherwise protected as the filings inventory is intended to be transmitted through unsecured networks. Accordingly, counsel must therefore ensure that the names of their filings are not in themselves classified or protected.

f. The email and the filing in the form of an attachment will be sent to all opposing counsel, the Presiding Officer, the Chief Prosecutor and their Deputies, the Chief Legal NCOs for the prosecution and defense, and the Assistant. Once filings have been assigned a filings inventory number, the Assistant will send them to the Chief Clerk of Military Commissions (CCMC.)

g. Emails sending a filing and acknowledgement that the filing was received shall be maintained by both senders and receivers. Note, however, that verification that a filing has been filed with the Commission will be as provided by the Filings Inventory as established by POM # 12.

h. Upon receiving a filing counsel shall immediately:

(1) Examine the address lines to ensure that all counsel concerned have been sent the filing. If not, the sender of the email will be immediately notified.

(2) Examine the contents and all attachments to ensure it is complete (such as in the case where one fails to insert an attachment, or the wrong attachment is included.)

(3) Counsel receiving a filing will reply by email, *only to the sender*, acknowledging receipt.

i. Citations to authority in filings.

(1) Counsel may, and in many cases must, cite authority or references in their filings. The “Blue Book” (Uniform Citations) shall be used.

(2) A web URL (web page address) is NOT acceptable as a citation because a web site can change, or the web page can become unavailable.

(a) *Exception 1:* A web URL may be included as a citation in a filing provided that the document associated with the web URL is contained in the Commissions Library. In such cases, the URL citation shall be immediately followed with an annotation as follows (contained in the Commissions Library.) Filings with this statement will be returned by the Assistant with compliance with this POM if the document is not, in fact, in the Commissions Library. *See* POM # 14-1 on having items placed into the Commissions Library.

(b) *Exception 2:* A web URL may be included as a citation in a filing if the document associated with the web URL is provided as an electronic attachment. In such cases, the URL will be followed with the annotation (___ pages attached as attachment ___). Filings with this statement will be returned by the Assistant for compliance with this POM if the document is not, in fact, attached. *See* paragraph 6 below for more information about attachments, their form, and how they are attached and transmitted.

6. Attachments to filings.

a. Counsel may find it beneficial to include attachments to their filings.

b. Attachments are required for any matter that the filing party wishes the Presiding Officer to consider in deciding the matter except:

(1) For items in the Commissions Library.

(2) For reported cases and other legal authority available through Lexis-Nexis or West Law.

(3) If the item has been previously provided in the form of an attachment by either party in any filing with respect to the *same* series of filings to which a response, reply, or supplement is being filed. Required attachments filed in different motions shall be attached again.

(4) If the matter has already been marked as an exhibit in a Commissions trial proceeding held on or after Sept 1, 2005.

c. **All attachments to a filing will be sent in the same email as the filing.** As an exception, if such an email would exceed the capabilities of the LAN, addressees of the email should be advised that an attachment will be sent by separate email. This practice will be used judiciously. When a filing states that an attachment is being sent and is not, the Presiding Officer or the Assistant may return the filing for compliance with this POM. Parties are welcome to make a filing with all the attachments to the filing merged into a single document.

d. Text attachments to filings will be in Microsoft Word, HTM/HTML, or RTF. Attachments will not be in “track changes” or “mark-up” format. If it is necessary to send images, JPG, BMP, or TIFF may be used. Consult the Assistant if you need to send other file formats.

e. Before sending an archived file (such as WinZip), get permission from the Assistant or the Presiding Officer.

f. Listing attachments.

(1) The last paragraph of any filing that includes attachments shall state in separate sub-paragraphs the name of the attachment, the number of pages, and that it is part of the email sending the filing. When a filing states that an attachment is being sent and is not, the Presiding Officer or the Assistant may return the filing for compliance with this POM.

(2) If a filing is sent that has all attachments merged into a single document (*See* paragraph 6(c) above), the last paragraph of the filing shall indicate that “the following attachments are electronically merged into this filing” and then list all such attachments and the number of pages of each individual attachment in separate sub-paragraphs.

7. Notice of motions.

a. As soon as a counsel becomes aware that they will or intend to file a motion or other request for relief, they shall file a Notice of Motion using the provisions in paragraphs 5 and 6 above. The notice, contained in an attachment, shall state the specific nature of the relief that shall be sought, and when they intend to file the motion. This requirement to file a Notice of Motions shall not serve to delay filing requirements, or other notice of motions requirements, established by the Presiding Officer, Commission Law, or POMs.

b. As an exception to paragraph 7a, a notice of a motion is not required if the party who is required to provide notice is able to file a motion within three duty days of when a notice of motions would ordinarily be due.

c. A notice of motion is not a motion, and it does not place an issue or matter before the Presiding Officer for decision. If a party files a notice of motion but does not file a motion, the Presiding Officer will not take any action on the underlying issue for which notice has been given. *See* also POM # 12, Filings Inventory.

d. Failure to provide timely Notice of Motion under this paragraph may result in waiver of the ability to file a motion. Requests for exceptions to waiver must be made to the Presiding Officer with specific reasons for failure to provide Notice of Motion in a timely fashion.

8. Motions.

a. **Timing.** Ordinarily the Presiding Officer will establish a deadline for the filing of motions by way of an Order.

b. **Format of a motion:** *See* enclosure 1.

c. **Waiver.** Motions which are not made in a timely fashion shall be waived. Requests for exceptions to waiver must be addressed to the Presiding Officer with motion-specific reasons for failure to make the motion in a timely fashion.

9. Responses.

a. **Timing.** Unless the Presiding Officer provides otherwise, a response is due within 7 calendar days after a motion is received.

b. **Format of a response:** *See* enclosure 2.

10. Replies.

a. Counsel may submit a reply to a response, however they must take care that matters that should have been raised in the original motion are not being presented for the first time as a reply. Replies are unnecessary to simply state the party disagrees with a response. If a reply is not filed, that indicates that the party stands on their motion or initial filing, and it does not indicate agreement with a response.

b. **Timing:** Replies shall be filed within three days of receiving a response unless the party does not desire to file a response.

c. **Format for a reply:** *See* enclosure 3.

11. Supplements to filings.

a. Supplements may be filed for any reason *provided however*, that a party wishing to file a supplement must first obtain permission from the Presiding Officer briefly stating the reason why a supplement is necessary. Supplements should be reserved for those cases when the law has recently changed, or if material facts only recently became known.

b. A request to file a supplement is a special request for relief. *See* para 12 below. All the provisions of paragraphs 5 and 6 apply, except that the request may be contained in the body of an email. The request shall briefly state the reason why a supplement is necessary.

c. If the Presiding Officer authorizes a supplement to be filed and one is filed, all the provisions of paragraphs 5 and 6 shall apply in the manner and form (attachment) in which the supplement is sent. The supplement itself shall contain those facts, and that law, necessary to supplement a previous filing generally following the format for replies or responses.

12. Special requests for relief.

a. Counsel may at times have requests for relief that do not involve lengthy facts or citations to authority. Common special requests for relief could address, for example, requests to: supplement a filing, for extension to submit a filing, for an extension of a POM timing requirement, to adjust the “received” date of a filing, to append or attach documents to a previously made filing, an exception to a requirement to digitize attachments, or like matters that do not require involved questions of law or fact. A motion in the form of a special request for relief relieves counsel of the specialized format for filings generally.

b. A motion in the form of a special request for relief will be filed following the requirements of paragraph 5 above except the request may be in the body of an email.

c. Either the Presiding Officer or the Assistant to the Presiding Officers may direct that a special request for relief be resubmitted as a motion before the matter will be considered by the Presiding Officer.

d. Counsel must not attempt to file a motion in the form of a special request for relief to avoid submitting a notice of motions, because the time for a notice of motion or other filing has passed, or solely to avoid the formatting requirements of paragraph 8b and enclosure 1.

e. The content of a special request of relief will contain the style of the case, the precise nature of the relief requested, those facts necessary to decide the request, citations to authority if any, and why the relief is necessary.

13. Request for extensions of time.

a. Requests to extend the time provisions in this POM shall be in the form of a special request for relief. The request itself may be contained in the body of an email. The provisions of paragraphs 5 and 6 apply.

b. The request may be made by any counsel on the case. It may also be made by the Chief or Deputy Chief Prosecutor, or the Chief or Deputy Chief Defense Counsel, if detailed or civilian counsel on the case are unavailable to receive service of a filing, is unavailable, or otherwise is unable to request an extension.

14. Burdens of proof and persuasion. As a general rule, the burden of proof (production of evidence) and the burden of persuasion in motions practice is on the moving party. In any motion in which the moving party does not believe that the general rule should apply or believes that one or both of the burdens should change after a certain quantum of evidence is introduced, the party must provide:

a. A statement of the burden of proof (production of evidence) in the particular motion,

b. A statement of the burden of persuasion in the particular motion,

c. The point, if any, at which either the burden of proof or the burden of persuasion is shifted to the non-moving party, and

d. The legal argument in support of the statement, particularly focusing on Commission Law.

15. Security considerations and exceptions.

a. This POM does not relieve any person from their duty to adhere to Commission Law, Federal and other laws and regulations concerning the handling, marking, dissemination, and storage of classified or protected information.

b. No party may send any classified or other protected material to the Presiding Officer or the Assistant by email. If there is a need to transmit classified or protected material to the Presiding

Officer or the Assistant, counsel will so advise the Assistant. The Assistant will provide transmission protocols.

c. Filings that contain classified or other protected information. In the event that a motion or filing contains classified or other protected information, the person preparing the filing will send a notice of motion in accordance with paragraph 7 above sufficiently detailed - consistent with not revealing classified or other protected information - to assist the Presiding Officer in scheduling resolution of the matter. Counsel will then provide a complete filing in written form with opposing counsel following the format described in this POM. Counsel preparing the filing will make two additional copies for the Presiding Officer and Assistant to review when security considerations can be met.

16. Rulings. The Presiding Officer shall make final rulings on all motions submitted to him based upon the written filings of the parties submitted in accordance with this POM, and the facts and law as determined by the Presiding Officer, unless:

a. Material facts, that are necessary to resolution of the motion, are in dispute which requires the taking of evidence, or

b. A party correctly asserts in a filing that the law does not permit a ruling on filings alone, accompanied by citation to the authority which prohibits the Presiding Officer from ruling on the filings alone.

c. The Presiding Officer, in his sole discretion, determines that oral argument is necessary to provide a full and fair trial.

17. Nothing in this POM should be construed to dissuade counsel from an early sharing of information, to include motions and other filings, to ensure a full and fair trial.

Original signed by:

Peter E. Brownback III
COL, JA, USA
Presiding Officer

3 Enclosures
1. Format for Motion
2. Format for Response
3. Format for Reply

Enclosure 1 to POM # 4-3, Format for a Motion

UNITED STATES OF AMERICA

v.

[Name of Accused]

[aka if any; not required]

Note: A filings inventory number is not usually available for the first motion or filing in a series. It will be added by the APO when the filing is received, and included in responses and replies.

Defense Motion

to Suppress Oct 5, 2002 Statement Allegedly Made by
the Accused to Joe Jones

[Date motion filed]

Note: Use bold as shown above.

Note: The caption above was created using a 2 column table. Counsel may use that method, or any other, that separates the name of the case from the name of the filing.

NOTE: The following will be included in separately numbered paragraphs. Use Arabic numbers.

1. A statement that the motion is being filed within the time frames and other guidance established by this POM or other direction of the Presiding Officer or a statement of the reason why it is not.
2. A concise statement of the relief sought.
3. (Optional): An overview of the substance of the motion.
- 4 (May be required.) Statement concerning burden of proof. *See* paragraph 14 of this POM.
5. The facts, and the source of those facts (witness, document, physical exhibit, etc). Each factual assertion will be in a separate, lettered sub-paragraph. This will permit responses to succinctly admit or deny the existence of facts alleged by the moving party. If the facts are or the identity of the source is protected or classified, that status will be noted.
6. Why the law requires the relief sought in light of the facts alleged including proper citations to authority relied upon. *See* paragraph 5i of this POM for citation rules and special considerations for URL citations and cites to Commissions Library materials.
7. Whether oral argument is requested and *required* by law. If asserted that argument is required by law, citations to that authority, and how the position of the party cannot be made fully known by filings in accordance with this POM.
8. The identity of witnesses that will be required to testify on the matter in person, and/or evidentiary matters that will be required. (Listing a witness is not a request for the witness. *See* POM # 10-1. Stating the evidence needed is not a discovery request or a request for access to evidence. *See* POM # 9-1.
9. Additional information not required to be set forth as above.
10. A list of attachments. (*See* paragraphs 5 and 6 of this memorandum when attachments must be listed here, and the format for doing so.)

(Note: a size 11 font was used to provide this information on a single page. Please use a 12 font in the filing.)

Enclosure 2 to POM # 4-3, Format for a Response

UNITED STATES OF AMERICA

v.

[Name of Accused]

[aka if any; not required]

D 104 [Name of Accused]

Government Response

To Defense Motion to Suppress Oct 5, 2002 Statement
Allegedly Made by the Accused to Joe Jones

[Date motion filed]

Note: Use bold as shown above.

NOTE: The following will be included in separately numbered paragraphs. Use Arabic numbers.

1. A statement that the response is being filed within the time frames and other guidance established by this POM or other direction of the Presiding Officer, or a statement of the reason why it is not.
2. Whether the responding party believes that the motion should be granted, denied, or granted in part. If granted in part, the response shall be explicit what relief, if any, the responding party believes should be granted.
3. Overview - Only if the motion contains an overview paragraph. This paragraph is not required even if the motion had an overview paragraph.
4. Those facts cited in the motion which the responding party agrees are correct. When a party agrees to a fact in motions practice, it shall constitute a good faith belief that the fact will be stipulated to for purposes of resolving a motion. These will correspond to the subparagraph in the motion containing the facts involved.
5. The responding party's statement of the facts, and the source of those facts (witness, document, physical exhibit, etc.), insofar as they may differ from the motion. As much as possible, each factual assertion should be in a separate, lettered subparagraph. If the facts or identity of the source is Protected or classified, that status will be noted. These will correspond to the subparagraph in the motion containing the facts involved.
6. Why the law does not require or permit the relief sought in light of the facts alleged including proper citations to authority relied upon. (*See* paragraph 5i of this POM for citation rules and special considerations for URL citations and cites to Commissions Library materials.)
7. (May be required): Address this POM's paragraph 14 issue regarding burdens if addressed in the motion, or it is otherwise required to be addressed.
8. Whether oral argument is requested and *required* by law. If asserted that argument is required by law, citations to that authority, and how the position of the party cannot be made fully known by filings in accordance with this POM.
9. The identity of witnesses that will be required to testify on the matter in person, and/or evidentiary matters that will be required. Listing a witness is not a request for the witness. *See* POM # 10-1. Stating the evidence needed is not a discovery request or a request for access to evidence. *See* POM # 9-1.
10. Additional information not required to be set forth as above.
11. A list of attachments. *See* paragraphs 5 and 6 of this memorandum when attachments must be listed here, and the format for doing so.

(Note: a size 11 font was used to provide this information on a single page. Please use a 12 font in the filing.)

Enclosure 3 to POM # 4-3, Format for a Reply

UNITED STATES OF AMERICA

v.

[Name of Accused]

[aka if any; not required]

D 104 [Name of Accused]

Defense Reply

to Government Response to Defense Motion to
Suppress Oct 5, 2002 Statement Allegedly Made by the
Accused to Joe Jones

[Date motion filed]

Note: Use bold as shown above.

NOTE: The following will be included in separately numbered paragraphs. Use Arabic numbers.

1. A statement that the reply is being filed within the time frames and other guidance established by this POM or other direction of the Presiding Officer, or a statement of the reason why it is not.
2. In separately numbered paragraphs, address the response as needed. When referring to the response, identify the paragraph in the response being addressed.
3. Citations to additional authority if necessary. *See* paragraph 5i of this POM for citation rules and special considerations for URL citations and cites to Commissions Library materials.
4. The identity of witnesses not previously mentioned in the motion or response who will be required to testify on the matter in person, and/or evidentiary matters not previously mentioned in the motion or response that will be required. Listing a witness is not a request for the witness. *See* POM # 10-1. Stating the evidence needed is not a discovery request or a request for access to evidence. *See* POM # 9-1.
5. Additional information not required to be set forth as above.
6. A list of any additional attachments. *See* paragraphs 5 and 6 of this memorandum when attachments must be listed here, and the format for doing so.